No. 89-1508

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Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NGPL GAS PIPELINE COMPANY OF AMERICA,
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Ignoring the jury's and lower courts' findings and instead citing selectively to the trial record, respondents argue that each of the two independent questions presented is not actually before the Court in this case. Respondents try to dispatch the preemption question on the ground that FERC "specifically considered" (Opp. 16) petitioner's claim when it ruled that the only rate for gas not taken is the F-1 rate. *Id.* at 2, 13-20. Similarly, respondents assert that petitioner's separate antitrust claim—that the exercise of actual monopoly power is sufficient to prove attempted monopolization—is merely a "current theory" (*id.* at 23) not fairly presented to the jury or the courts below. *Id.* at 21-23. On these bases, respondents hope to avoid the conflicts in the circuits and to sidestep the otherwise manifest errors in the two holdings challenged in the petition. There is no merit to either of respondents' pivotal claims.

I.

1. Respondents' defense of the preemption holding below turns entirely on its assertion that "FERC expressly denied CIG's request for H-1 fixed costs for gas not taken, ruling instead that the only rate for such gas was to be the F-1 fixed cost rate." *Id.* at 14. This assertion, however, simply begs the question. Petitioner does not dispute the Tenth Circuit's holding that FERC limited recovery for gas not taken to the F-1 rate. But the point of petitioner's claim is that FERC's ruling addressed only gas not taken *in good faith*. FERC has never stated that it intended to preempt the entirely separate question of what the measure of damages ought to be for gas not taken *in bad faith*. To the contrary, the Tenth Circuit acknowledged that FERC did not address this question in its *amicus* brief filed in that court (Pet. App. 11a n.9 ("FERC was not explicitly confronted with the question of whether Natural's motive for not purchasing gas would be relevant to the rate CIG could collect for that

gas")), and FERC's brief itself expressly disclaimed any intent to address the question (see Pet. 6). In fact, prior to trial in this case NGPL petitioned FERC for an order that this claim (and all of the complaint) was preempted, and FERC expressly refused to issue such an order. *Colorado Interstate Gas Co.*, 31 FERC (CCH) ¶ 61,325 at 61,743 (June 19, 1985). This is plainly *not* a case, like *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), where a disappointed litigant is using state law to seek relief that had been denied by a federal agency (Opp. 15); the federal agency here has never been presented with petitioner's claim.

For the same reason, respondents' assertion that petitioner's claim violates the filed rate doctrine is simply without merit. Petitioner has never sought recovery at an unfiled rate; rather, it has always sought recovery at the filed rate for purchased gas. This is the appropriate rate, because the remedy for bad-faith performance is to put the injured party in the position in which it would have been, but for the breach. Pet. 14 n.8. There is no dispute that the H-1 rate is the filed rate for purchased gas, and no dispute that FERC has never disapproved the use of such a rate in computing damages for gas not taken in bad faith. Thus, contrary to respondents' assertion, the essence of petitioner's claim has always been a dispute over the *volume* of gas that NGPL failed to purchase.[1]

There is, in turn, no merit in respondents' attempt to distinguish the conflict between the Tenth Circuit's holding and that of the Fifth Circuit in *Gulf States Utilities Co.* v. *Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987), on the ground that this case involves a rate "specifically rejected" by FERC. Opp. 19. Both cases involved

[1] Contrary to respondents' erroneous assertion (Opp. 7 & n.8), petitioner introduced evidence of the volume of gas that NGPL would have purchased from CIG had NGPL adhered in good faith to its own least-cost gas purchasing policy. See Pet. App. 55a; Tr. 2438-439; Ex. 2159, 2206. See also, TR 1670-1677 (Leitzinger).

an allegation of the breach of duty to perform in good faith, and both were disputes about the volume of gas taken and not about rates. Yet, in *Gulf States*, the court held that "breach of an independent duty to act in good faith" is not preempted by the filed rate doctrine or the Commission's exclusive authority to set rates. Respondents' token attempt to distinguish the Fifth Circuit's rulings in the curtailment cases (Opp. 20) is unsound for the same reasons as the Tenth Circuit's analysis. See Pet. 14-15 & n.9.

2. Respondents argue that, even if the Tenth Circuit's field preemption analysis is incorrect, state law claims for "breach of the covenant of good faith" should be preempted "as conflicting with FERC's authority" because such claims constitute an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Opp. 17-18 (citing *Hines* v. *Davidowitz*, 312 U.S. 52, 67-8 (1941)). In fact, the duty to perform in good faith is incorporated in the Service Agreement, which had been approved as modified by FERC, and therefore, the obligation to act in good faith is itself part of the FERC-approved filed rate. Enforcement of that duty is entirely consistent with Congress's and FERC's stated objective of procuring the lowest gas prices for consumers. See Order No. 380-C, 49 Fed. Reg. 43,625 (1984), FERC Stat. & Reg. Preambles (CCH) ¶ 30,607 (Oct. 30, 1984) (codified at 18 C.F.R. § 154). It is NGPL's bad faith conduct—which resulted in purchases of higher priced gas—that is inconsistent with federal "purposes and objectives," not CIG's state law remedy for that conduct. See Pet. 19.

Respondents similarly argue that the threat of state law liability for breach of the implied covenant of good faith would "chill" NGPL's "FERC-granted freedom" to "pick and choose" when it will purchase natural gas. Opp. 16. That argument rests on the incorrect assumption that FERC intended to grant NGPL the "freedom" to engage in affirmative misconduct and to manipulate

its purchase decisions in bad faith. However, in the numerous FERC decisions quoted by petitioner and ignored by respondents, FERC has repeatedly held that its orders modifying liability for simple breach of contract do not preempt state law claims for negligence, bad faith, fault or willful misconduct. See Pet. 17 & n.16 and Pet. App. 1b-74b.

3. The fact that respondents' discussion of the preemption holding requires almost twice as much space as the decision itself is not surprising in light of respondents' refusal to defend in any way the rationale of the Tenth Circuit. Despite respondents' disclaimers, the Tenth Circuit's *holding* was that all common law claims "based upon breach of contract" are preempted and "[a]ctions based upon tort were not meant to be preempted. . . ." Pet. App. 14a. The court reasoned that FERC's exclusive authority to establish wholesale rates for sales of natural gas "must have room to breathe" and thus all state law claims within the "field" of contract remedies—not just claims which *conflict* with FERC's rulings—are preempted. *Id.* at 12a-14a. This issue—whether claims seeking contract damages based upon "affirmative misconduct" are preempted—was expressly left open by this Court in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); see Pet. 15 n.11. Moreover, the Tenth Circuit's "bright line" distinction between tort and contract claims is inconsistent with the resolution of the preemption issue by the Fifth Circuit and by FERC. See Pet. 13 & nn. 7, 15 & 16.

At bottom, respondents attack the arguments advanced in the petition by recharacterizing the facts. Respondents do not, and cannot, defend the Tenth Circuit's novel holding that "field" preemption extends beyond the field of exclusive federal concern (as defined by Congress or the agency) in order to provide "breathing room" for federal interests. See Pet. 15-18. Respondents also do not defend the court's decision to infer FERC's preemptive "intent[]" (see Pet. App. 14a) from that agency's

silence, an inference which is contrary to established preemption doctrine of this Court. See Pet. 16-17. Nor do respondents offer more than a token effort at distinguishing the Fifth Circuit cases that conflict with the decision below. Because of the impact of the decision below on the substantial number of contracts which are modified or affected by orders of federal regulatory agencies (such as Order No. 380 or the curtailment orders discussed above), this Court should grant certiorari.

II.

1. Petitioners' antitrust claim is wholly independent of Sections 2 and 4 of the gas purchase agreement that was the focus of concern on the preemption claim. The agreement is relevant to the antitrust claim only to the extent it created NGPL's opportunity to control petitioners' pipeline capacity and thus exclude petitioner from the market. Respondents' attempt to confuse the antitrust issues with the FERC preemption issues is therefore without merit.

Respondent's principal opposition to the antitrust question is the assertion that "the main issue that CIG raises . . . is not presented by this case." Opp. at 21. In respondents' view, the Tenth Circuit has "nowhere disputed the proposition that a party has actual monopoly power when it can control prices and exclude competition" (*id.*), and it "was not presented with, and the record does not support, GIG's current theory that this is a simple Section 2 case involving the putative monopolist's charging of supracompetitive prices." *Id.* at 23. These assertions are flatly wrong.

Petitioner's economic expert witness expressly concluded that NGPL not only attempted, but in fact succeeded, in its attempt to confer a monopoly on the Trailblazer System:

> I have concluded that there was a significant dangerous probability that this attempt to monopolize would succeed. *I have concluded that in fact that to a very great extent it did succeed.* NGPL,

> acting on behalf of its interests in the Trailblazer, was able to largely *eliminate competition* in the long distance transportation market, increasing the market share of the Trailblazer System. They were able to force shippers, Champlin as an example, . . . *to pay higher transportation costs* to move gas to market. And . . . they were well aware of the impact that all of this had had on competition.[2]

The jury was subsequently instructed that a finding of market strength that approaches monopoly power—defined as "the ability to control prices and exclude competition"—was sufficient to establish a dangerous probability of successful monopolization. See Pet. 10 n.5. Acting on that instruction, the jury found in petitioner's favor. The district court then squarely upheld the jury's finding against respondent's motion for J.N.O.V.: "The weight of the evidence supports the jury's finding that NGPL possessed the power to control prices and exclude competition." Pet. App. 52a.

The court of appeals did not hold that the jury's finding was clearly erroneous, and it is obvious that there is no basis for such a ruling. Moreover, respondents cannot find a single word in the opinion to quote in support of their theory that the core antitrust reasoning and result in this case is "an essentially hypothetical discussion." Opp. at 21. Contrary to respondents' assertion (Opp. 25 n.28), the court of appeals expressly held that NGPL deliberately chose to tie up CIG's line, that this tie-up reflected NGPL's "ability to exclude CIG," that shippers accordingly were forced to use the more expensive Trailblazer System, and that this "predatory conduct" resulted in "rais[ing] the Trailblazer System's market share to 54%." Pet. App. 23a. The court of appeals further held that unambiguously predatory conduct that excludes a lower-priced competitor, insulates a competitor

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[2] Tr. 1715-16 (emphasis added); see also Tr. 1688 (Leitzinger) ("not only did this attempt to monopolize on the part of NGPL have a high and dangerous probability of succeeding, to a very great extent it was successful . . .").

from competition for six years and enables that competitor to impose supracompetitive prices on the marketplace, is nevertheless perfectly legal under Section 2 so long as the exercise of monopoly power is limited in market share (to no more than 54%) and limited in time:

> In this case, the Trailblazer System's ability to charge supracompetitive prices could last only as long as Natural had the contractual right to tie up CIG's pipeline capacity. This right was strictly limited by the duration of the Service Agreement. Once Natural's control over CIG's capacity ended, the market would return to the status quo since the Trailblazer System would be helpless to compete against the unused and inexpensive capacity of CIG's system.

Pet. App. 27a (footnotes omitted). The court of appeals simply failed to understand the antitrust significance of the very facts it accepted as being proved in this case.

Respondents do not and cannot dispute that such a holding is insupportable under any sound conception of the antitrust laws. They ignore *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986), in which this Court unanimously held that a " 'finding of actual, sustained adverse effects on competition . . . is legally sufficient' " to support a violation of Section 1. See Pet. 26-27. They also ignore the Justice Department's policy of challenging a merger that threatens a price increase for two years or longer. See *id.* at 23. And, finally, respondents do not dispute that these principles are equally applicable to Section 2. All respondents argue is that the court of appeals stated its holdings only "hypothetically," and the complete response to that argument is the text of the opinion itself.

2. Respondents use these same arguments to distinguish the conflict with *Associated Radio Serv. Corp.* v. *Page Airways, Inc.*, 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). *Page* is distinguishable, they claim, because there is allegedly no finding here, as

there was in *Page*, of an ability to charge supracompetitive prices. Opp. at 27. But such a characterization of the court of appeals' opinion is simply fanciful. See *supra*, pages 6-7. As the jury found, transportation rates on the Trailblazer System were supracompetitive because they were higher than the rates that shippers would have paid in a competitive market, *i.e.*, one in which the capacity of a low-cost competitor (CIG) had not been deliberately tied up to eliminate it from competing to provide transportation service.[3] Thus, even if *Page* "rests on a narrow foundation" (Opp. at 27), that same foundation is present here. Pet. 20-21.

Furthermore, respondents simply ignore what makes the conflict with *Page* one of broad significance. The Fifth Circuit recognized in *Page* that predatory conduct that harms competition by raising prices violates Section 2 under a theory of *either* attempted *or* actual monopolization, and that the harm to competition is what distinguishes such conduct from a mere business tort. 624 F.2d at 1353-57 & nn. 18, 22, 25. Here, in contrast, the Tenth Circuit has held that predatory conduct that allows a competitor to charge supracompetitive prices but will last only for six years is merely an "unfair method[] of competition that only threaten[s] to have a transitory impact on the marketplace." Pet. App. 28a. This conflict goes to the heart of Section 2 and the antitrust laws, and therefore should be addressed by this Court.

3. Respondents' attempt to distinguish the conflict with the Ninth and Eighth Circuits on the standards for attempted monopolization similarly has no merit. The essense of this conflict, which just last year expanded into the Eighth Circuit and which has long been recognized by

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[3] Respondents' contention that Champlin was "attracted" to the low prices of the Trailblazer System (Opp. 6 n.5, 22) is astonishing in light of 1) Champlin's *amicus* brief in support of this petition, 2) the jury's undisturbed finding of tortious interference with contractual relations and 3) the district court's finding that "CIG's exclusion resulted in higher prices to producers, shippers, and consumers of natural gas." Pet. App. 40a-41a.

courts and commentators alike,[4] is that "an attempted monopoly violation can be found with evidence of conduct alone." *Twin City Sportservice Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291, 1309 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982); see Pet. 21-22. This is also the standard employed by the Department of Justice. See Pet. 23-24. There is no doubt that, under this standard, the evidence in this case of conduct that actually excluded competition and raised prices would have been sufficient in the Eighth and Ninth Circuits to establish attempted monopoly.

4. This case clearly is an appropriate one in which to address these longstanding conflicts. Although respondents belabor the point that NGPL is not identical to the Trailblazer System, they do not argue, and could not reasonably argue, that deliberate predatory conduct that confers a monopoly on an affiliate is immune from Section 2.[5] The fact that NGPL exploited a contract "right" to achieve its ends does not mean that NGPL did not also exploit the Trailblazer System's "economic power in the marketplace. . . ." Opp. 25. This case is no different from a host of other Section 2 cases where the monopolistic conduct involves abuse of contractual rights, sham litigation, fraudulent patent procurement and other predatory acts. As explained in the petition (Pet. 27-28), the characteristics of the market at issue here make

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[4] See, *e.g.*, *Mobil Oil Corp.* v. *Blanton*, 471 U.S. 1007 (1985) (White J., dissenting from denial of certiorari); *E.J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (Brennan and White, J.J., dissenting from denial of certiorari.)

[5] The short answer to respondents' extended argument that NGPL had no significant interest in the Trailblazer System (Opp. 6 & nn. 5-6, 23-24 & n.27) is that the jury and the district court squarely rejected it. See Pet. App. 51a-52a. They recognized that ownership of a pipeline is not equivalent to control over the use of the pipeline, and that the substantial benefit to NGPL from forcing shippers to use Trailblazer lay not in profits but in attaining sufficient capacity to service its debt. See Pet. 7 n.3.

this case an ideal illustration of the perils of a narrow focus on market share. Given the substantial and persistent conflicts among the courts of appeals on the question presented, this Court should grant the petition to resolve the most elemental and recurring issues under the attempted monopolization portion of Section 2 of the Sherman Act.

CONCLUSION

For the reasons set forth above and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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